

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

BISOUS BISOUS, LLC)
)
 Plaintiff,)
)
 vs.) 3:21-CV-1614-B
)
 THE CLE GROUP, LLC, BISOU,)
 UPTOWN MANAGER, LLC, and)
 JOHN DOES 1-10,)
)
 Defendants.)

**MOTION FOR PRELIMINARY INJUNCTION
BEFORE THE HONORABLE JANE J. BOYLE
UNITED STATES DISTRICT JUDGE
AUGUST 11, 2021**

A P P E A R A N C E S

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proceedings reported by mechanical stenography,
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1 (In open court at 3:15 p.m.)

2 THE COURT: Good afternoon.

3 This is Case Number 3:21-CV-1614. I think
4 it's Bisous -- but you-all can pronounce it for
5 me -- Bisous, LLC, v. the Cle Group, LLC.

6 Who is here for the plaintiff, and how do
7 you pronounce their names?

8 MR. CONRAD: Good morning, Your Honor.
9 David Conrad on behalf of the plaintiffs.

10 THE COURT: How do you pronounce it?

11 MR. CONRAD: Bisous Bisous.

12 MR. KULA: Kenneth P. Kula with
13 Christopher Joe on behalf of the defendants.

14 THE COURT: Okay. We have a motion for
15 preliminary motion. I have read through all of it
16 and your cases and your addendums and everything
17 else. And I have looked at both sides' record
18 exhibits, including the tapes. And I would just
19 like to hear from you, you know, not all of the
20 motion again, but come on up here, please.

21 Mr. Conrad.

22 MR. CONRAD: Mr. Conrad, that's right,
23 Your Honor.

24 THE COURT: Who do you work for?

25 MR. CONRAD: I am with Fish & Richardson.

1 THE COURT: Okay. Okay. Take your time.

2 I'll cut you off when I think I need to

3 MR. CONRAD: Good morning, Your Honor.

4 THE COURT: Good afternoon.

5 MR. CONRAD: It's unfortunate that we are
6 here today.

7 We had received notice -- my client had
8 received notice around the early part of January
9 this year that a Houston restaurant group was going
10 to be opening a restaurant in Dallas with a
11 confusingly similar name, Bisou, to my clients
12 trademark Bisous Bisous.

13 And immediately, they notified the
14 defendants, sent a letter, and --

15 THE COURT: Before you sent them a letter?

16 MR. CONRAD: Around January 25th, I
17 believe, we sent them a letter, a cease and desist
18 telling them not to do this.

19 And they responded, and they said things
20 like our mark was generic, that there was no
21 confusion, and that they weren't going to comply.

22 In addition to that, they filed their own
23 federal registration for Bisou. They hadn't already
24 done that, but they went ahead and did that at this
25 point.

1 We didn't hear much for a little while.
2 And then sometime around June, a vendor shows up to
3 my client's pâtisserie down on McKinney Avenue, and
4 they were confused. They went to the location that
5 they thought was the restaurant Bisou.

6 In addition, around that time, someone
7 showed up for a job interview. They also were
8 confused. They were looking for Bisou, the
9 restaurant, not Bisous Bisous, the pâtisserie.

10 My client has been here since the early
11 part of the 2010s. So she started in the White Rock
12 local market selling her own macarons. She quit her
13 corporate job to start this -- this bakery. And she
14 graduated from the market to a local restaurant on
15 McKinney Avenue, her dream. And that was around
16 2014/2015, and her restaurant has been there since,
17 her pâtisserie.

18 Now --

19 THE COURT: How many years has it been
20 there?

21 MR. CONRAD: Around 2014/2015 with a
22 physical retail location on McKinney Avenue.

23 THE COURT: Okay. She's done the best she
24 could to build this brand over the years. She's
25 done interviews on TV. She's promoted the brand and

1 mark on social media. She's been out there making a
2 name for it and doing quite well.

3 She's successful objectively by people who
4 like her pastries, her macarons and whatnot. And
5 Bisous Bisous is part of that fame here in Dallas.

6 So when the defendants came in, it caused
7 immediate harm to her. Not only was there actual
8 confusion that -- that was apparent when the
9 plaintiff began coming in, but they set up an
10 opening night on July 7th. And on the screen here
11 is an Instagram post advertising it, and you can see
12 they used the word "Bisou."

13 They had an opening night on July 7th.
14 And then immediately thereafter, we started
15 receiving negative reviews on Google. If you can
16 see here on the screen --

17 THE COURT: Now, this isn't the girl who
18 was upset about being fired or anything.

19 MR. CONRAD: I -- I don't know, Your
20 Honor.

21 THE COURT: Okay.

22 MR. CONRAD: I'll let them talk about that
23 if they want to. I'm not going to worry about that.

24 The fact is someone posted negative
25 reviews on here. And if you can see at the bottom

1 it says from someone named Aneth, said, "Very rude
2 service would not go back ever again. Do not
3 recommend." One star.

4 And you see above that there's a response
5 from the owner, where staff from Bisous Bisous
6 Pâtisserie is having to respond to this and deal
7 with it and counteract the negative effect of a
8 one-star review. That wasn't it. There were many
9 one-star reviews that appeared all of a sudden.

10 Now, the meaning behind that and why it
11 happened, I don't know. I will let the defendants
12 speak to that. But the fact was these individuals
13 thought they were posting to Bisou restaurants when,
14 in fact, they were trying to trash the review system
15 for Bisous Bisous -- when, in fact, they were
16 trashing the review system for Bisous Bisous
17 Pâtisserie.

18 Now, these one-star reviews are incredibly
19 harmful.

20 THE COURT: . . . body slam me, that's a
21 little -- go ahead.

22 MR. CONRAD: Well, these restaurants and
23 the like, they live and die by these reviews.
24 Because if it drops below a certain level, say below
25 a 4.0, some may consider that a negative commentary

1 on the restaurant and skip it.

2 So what happened in response to this,
3 Bisous Bisous representatives went to Google and
4 complained. And Google did take about a two-week
5 period of these negative reviews off, but also any
6 good reviews that had occurred during that time
7 frame. There was no choice. They just wiped
8 everything for two weeks.

9 So not only did -- was she able to get
10 this back, anything good that would have raised her
11 level from 4.1 up towards 5 would have been gone, as
12 well, if there were five-star reviews.

13 So there was harm by this confusion. And
14 as you can see on this slide right here, they are on
15 McKinney Avenue right down the road from each other
16 in the same entertainment district.

17 THE COURT: Yeah, they are.

18 MR. CONRAD: That's not the only other
19 kind of harm that we have actually experienced.

20 Here on the screen are several -- I
21 believe they are -- Instagram posts. And on the
22 left, you will see one that looks like it's at a
23 club. In the middle, you will see people that look
24 like they're at a bar.

25 And what you will notice on each of those

1 is, at the top they were a check in, a tag at Bisous
2 Bisous Pâtisserie, not at Bisou restaurant. And on
3 the bottom right, here's what the effect is. When
4 you look at Bisous Bisous Pâtisserie on Instagram
5 and look at all their -- all their photos, which
6 should be photos of people celebrating outside the
7 storefront, macarons, cake, family, whatever else
8 could be up there, pictures from Bisou restaurant
9 started showing up. And as you can see, they are
10 not all family friendly.

11 THE COURT: Um-hum.

12 MR. CONRAD: So Ms. Meyer, who founded the
13 restaurant, she testified in her declaration that
14 she will never know how many customers may have
15 decided not to visit or order from her pâtisserie
16 because they believed the negative reviews for Bisou
17 were about Bisous Bisous. She won't know the ripple
18 effect of these negative reviews and the extent to
19 which people have been deterred from patronizing her
20 bakery merely because they have heard how awful a
21 place Bisous Bisous is.

22 THE COURT: As of today, are they still
23 getting negative feedback from people?

24 MR. CONRAD: I haven't had an update in
25 the past, two, three or four days, somewhere around

1 that time frame. My client is actually receiving
2 medical treatment right now.

3 THE COURT: But two or three days ago?

4 MR. CONRAD: I don't know. But up on the
5 screen I have something from August 3rd or 4th,
6 which is well after the previous events.

7 THE COURT: Yeah, yeah.

8 MR. CONRAD: And this is what we recently
9 filed here, if I may play it, Your Honor, is a
10 voicemail.

11 (Voicemail played.)

12 MR. CONRAD: That individual on
13 August 3rd left that voicemail at my client's phone
14 number. And on the next day, I guess he didn't get
15 a response for that, so he sent an email to Bisous
16 Bisous following up, trying to get that reservation,
17 Mr. Princeton Marcellus.

18 So here is another instance of confusion
19 that's -- it's still happening, not just for the
20 opening. And this individual is so confused, he
21 tries one contact method for us and doesn't succeed
22 and then tries the other contact method for us, all
23 the time thinking he's trying to make a dinner
24 reservation. My client doesn't do dinner
25 reservations. There's only one Bisou-related

1 restaurant that does.

2 The problem we are facing is time
3 sensitive. Here on the screen is a recent Instagram
4 post on Bisou's profile, advertising that the
5 original opening, I guess, was just a soft opening,
6 because their grand opening is coming up within a
7 week, next Wednesday, August 18th. So what we have
8 experienced previously is now likely to happen all
9 over again and worse, because this is the real
10 opening.

11 So my client has experienced actual harm
12 already. There's many instances of actual
13 confusion. This was just a sample. There's plenty
14 more in our filings.

15 THE COURT: Yes, I have seen them.

16 MR. CONRAD: I can walk you through each
17 of the digits of likelihood of confusion to show how
18 we are likely to win this case. And I am happy to
19 do that if you want, but so far, the actual
20 confusion is overwhelming.

21 And as the cases say, when you have actual
22 confusion in the strength of a Mark, this one is
23 arbitrary. We don't sell kisses. That overwhelms,
24 and that's very convincing evidence that there's a
25 likelihood of confusion.

1 THE COURT: Okay. Yeah, you don't have to
2 go through the digits of confusion. I will say,
3 though, these are different products. So tell me
4 about that.

5 MR. CONRAD: Not exactly. These are
6 restaurant services that both of them provide. And
7 so when you're looking at the similarity of products
8 of services, you don't have to have identical
9 products or services. It's not just a counterfeit.

10 So there are cases that we have cited,
11 such as the Exxon case, in which one of the
12 businesses was a -- they sold car parts, I believe,
13 or maintenance services. And the other was Exxon,
14 as you know it, the petroleum company and the gas
15 station. They didn't overlap in the sense that they
16 both sold gas or they both sold car parts or
17 maintenance. It was close enough because everybody
18 had cars essentially, and it was likely to cause
19 confusion in the mind of potential purchasers.

20 We sell baked goods that are French
21 inspired. The defendant's restaurant is -- they
22 call themselves a French-inspired restaurant.

23 Now, they don't have a dessert menu yet.
24 Of course they will, it's a restaurant. I can't
25 imagine that they wouldn't. The equivalent

1 restaurant in Houston, Bisou in Houston, does have a
2 dessert menu, which we provided in our briefing.
3 And it has on its menu or baked good called Bisous
4 Bisous. So the similarity is close enough.

5 THE COURT: Yeah, but I mean direct
6 competition between the parties, services or
7 products is not necessary.

8 MR. CONRAD: That's right. And also who
9 was confused is -- is not necessarily has to be a
10 purchaser.

11 THE COURT: Right.

12 MR. CONRAD: The cases hold that it could
13 be vendors. It could be merchants that are confused
14 about the association between the two. So even
15 though there's not perfect overlap, which I think is
16 what the entire complaint of their response is, it's
17 not perfect overlap.

18 THE COURT: And you have the wrong
19 defendant, but go ahead. We'll talk about that
20 later.

21 MR. CONRAD: Sure. It doesn't have to be
22 complete overlap. At the end of the day, there's
23 confusion, and it's causing a harm to my customer --
24 to my client.

25 And the Marks are incredibly similar.

1 They sound the same. It's just that ours is
2 repeated twice. So that is a very similar Mark.

3 The fact that they -- they claim that they
4 stylize theirs is not relevant to this discussion or
5 it's not going to affect this discussion, because
6 it's -- the confusion is not coming from the logo.
7 The confusion is coming from -- also from things
8 like social media handles. Bisou -- at the Bisou
9 DTX is confusingly similar to Bisous Bisous the
10 pâtisserie. Hashtag Bisou on one of the social
11 media sites is confusingly similar.

12 When you check in at the restaurant on
13 Instagram or Facebook or the like, you're not going
14 to get Bisou's logo when you try to pick the
15 location you're at, you're going to get just the
16 name. So the stylization is not important. And it
17 doesn't matter what else they mix with it, because
18 when you see their postings, they have on their
19 social media postings things like, "The Cle Group
20 Requests the Pleasure," at the very top on slide 9.

21 They mention Cle Group somewhere else in
22 here, as well. They've got the stylization and so
23 on, and people are still confused. So the identity,
24 as close it needs to be for there to be likelihood
25 of confusion, hence the actual confusion.

1 Now, the intent part is not necessary.
2 We're not saying the defendants decided to pick
3 Bisou originally down in Houston and come after us.
4 But once they were made aware that we were already
5 in Dallas and their attorney, in their response
6 letter, acknowledged that we were known in Dallas,
7 then their actions can represent intent to stomp on
8 our Mark and the good will that our Mark has
9 created.

10 Evidence of intent is the fact that they
11 filed for a federal registration just in March after
12 we sent the notice of -- to cease and desist.

13 Intent is, they are continuing to trade on
14 this name, Bisou, and coming to Dallas despite us
15 telling them not to.

16 And some cases in the circuit even hold
17 that -- or have found that the fact that they have
18 tried to put a disclaimer, the fact they have tried
19 to put a disclaimer isn't evident of intent, trying
20 to get around the infringement of the Mark.

21 As far as degree of care goes, Your Honor,
22 it's apparent, because from the actual confusion
23 that these customers are not -- do not have a high
24 degree of care when the confusion is arising.
25 Confusion can happen at any point in the purchasing

1 process. And if someone is confused upfront and
2 mixes it up and finds out later that they were wrong
3 in the beginning, that's still confusion, and that
4 degree of care at the outset is very low in these
5 instances.

6 THE COURT: Okay.

7 MR. CONRAD: Your Honor, I believe that's
8 all that I have. If you have any questions --

9 THE COURT: No, I don't have any questions
10 right now.

11 Do you -- do you have -- do you believe in
12 the presumption of irreparable harm? Or tell me
13 where that fits into this.

14 MR. CONRAD: Yes. That didn't use to
15 exist. There was not necessarily a presumption of
16 irreparable harm, at least after eBay.

17 THE COURT: Yeah.

18 MR. CONRAD: But the Trademark
19 Modernization Act passed last year 15 U.S.C. 1116(a)
20 states that there is a rebuttable presumption of
21 irreparable harm upon a finding of likelihood of
22 success on the merits.

23 So if Your Honor finds that there is a
24 likelihood of success, we don't need to delve into
25 whether Bisous Bisous will be irreparably harmed. I

1 don't believe there's been any evidence to rebut it.
2 I am happy to address it if there is.

3 THE COURT: No need to address it right
4 now.

5 MR. CONRAD: And -- but we have presented
6 evidence of irreparable harm. As I mentioned
7 earlier, it has already happened. When my client
8 received bad reviews, she had to delete -- delete
9 all the reviews, including good reviews, in order to
10 address that situation, take the time and effort
11 away from their business to respond to these and
12 address it.

13 And as she testified in her declaration,
14 she has no idea who could have seen these reviews
15 and been turned away. And if this continues to
16 happen, as it appears to be doing, then this
17 irreparable harm will continue.

18 THE COURT: Okay. Thank you very much,
19 Mr. Conrad.

20 I'm going to talk to Mr. Kula or Mr. Joe.
21 Who is it going to be?

22 MR. KULA: I will, Your Honor.

23 THE COURT: You don't need a whole lot on
24 the right defendant, but you can go ahead and do
25 some of that.

1 MR. KULA: I'm going to skip over that and
2 leave that for you to decide on the papers, which I
3 don't think will take you very long at all.

4 THE COURT: Yeah.

5 MR. KULA: Good afternoon, Your Honor. I
6 do believe this is a fairly simple case, but I don't
7 believe it's a simple case in the way that plaintiff
8 is wanting to portray it.

9 In particular, the plaintiff cannot take a
10 portion of its registered mark and then take an even
11 smaller portion of the allegedly infringing mark,
12 compare those out of context of the consumer in the
13 marketplace looking for products.

14 THE COURT: But there's confusion.

15 MR. KULA: There is confusion.

16 THE COURT: There is confusion.

17 MR. KULA: There is confusion. There's
18 confusion, because I told my knucklehead 16-year-old
19 son to go down to Bisou and apply for a dishwasher
20 job, and he went to the bakery. That's the kind of
21 confusion we're talking about.

22 THE COURT: Did it happen?

23 MR. KULL: No, no.

24 THE COURT: Okay. Okay.

25 MR. KULA: No, I'm saying -- I mean,

1 that's the kind of confusion we're talking about.
2 We're talking about confusion about people calling
3 the wrong establishment; talking about people going
4 to the wrong place and dropping mail off at the
5 wrong place. That is not the type of confusion that
6 is relevant to a Lanham Act claim. We need to have
7 confusion between actual or potential customers in
8 the marketplace seeing the product with the mark and
9 confusing the source or the affiliation of that
10 mark. We don't have any of that confusion.

11 THE COURT: Assessing the similarity of
12 marks and services, exact similarities not required.

13 MR. KULA: No. I concede that exact
14 similarity is not required. But as I will get into
15 in a moment, there needs to be a -- a high scrutiny
16 of the marks. And when you look at the marks in the
17 totality of how they are presented to the consumer
18 in the marketplace, there is virtually no
19 possibility, let alone a likelihood of possibility
20 of confusion.

21 THE COURT: But there's confusion.

22 Go ahead. Go ahead. I'm listening.

23 MR. KULA: Okay. Well, if -- if it was
24 the type of confusion that plaintiffs wanted, and
25 that is simply that there is one word among our mark

1 that is similar to one word in their mark, then I
2 would contend that Mick Jagger would have enjoined
3 Rolling Stone magazine decades ago because he has
4 trademarks on "Rolling Stone," but the products have
5 to be similar.

6 THE COURT: Not that similar, but go
7 ahead. Rolling Stone and the Stones is not the
8 same.

9 MR. KULA: Okay. But they have to be more
10 similar than a 240-dollar Tomahawk steak and a
11 2-dollar French tart. They have to be more similar
12 than a 1,500-dollar bottle of Champagne and a French
13 croissant.

14 Now, I think actually, Your Honor, that
15 although I am confident that you are going to find
16 there is no likelihood of confusion when you are
17 looking at the marks in the totality as presented to
18 the consumers in the marketplace, I think actually
19 there is a silver bullet, and that is with regards
20 to the irreparable harm. Because as plaintiff's
21 counsel conceded, they knew of the possibility of
22 them coming to Dallas as early as late last year or
23 early January of this year.

24 THE COURT: And they wrote them a letter.

25 MR. KULA: And they wrote them a letter.

1 But they didn't seek preliminary injunction at that
2 time. And the cases said four months, six months
3 waiting period of time, when you know that there's a
4 potential for harm and not doing anything and
5 letting a company come in, like my client, and spend
6 \$2 million to open a business and then, after six,
7 seven months, try to get a preliminary injunction.

8 THE COURT: To be realistic, they didn't
9 get the confusion until after you put down roots.
10 And they couldn't have gotten anything from me that
11 I know of until the company put down roots, right?

12 MR. KULA: No. No. They wrote the letter
13 saying that there's confusion just by simply
14 uttering the word Bisou. So they should have sought
15 a preliminary injunction or TRO at that point in
16 time, not seven months later.

17 THE COURT: All right.

18 MR. KULA: Now, I want to point out that
19 as McCarthy states in McCarthy on Trademarks,
20 probable confusion cannot be shown by pointing out
21 that at some place at some time someone made a false
22 identification. And that's exactly what all of
23 plaintiff's case is resting on.

24 If -- if granted you overruled the
25 objections on hearsay, I don't know who these people

1 are calling in, if they are friends or family
2 members, but --

3 THE COURT: It's not hearsay, because they
4 are not offering it for the truth.

5 MR. KULA: But they are offering it for
6 the truth, Your Honor.

7 THE COURT: Okay.

8 MR. KULA: They are offering -- because
9 what relevance does it have that I call if I'm not
10 offering for the truth that I'm confused about a
11 product.

12 THE COURT: Okay. Go ahead.

13 MR. KULA: Okay. But even if it isn't
14 hearsay, it's still we need actual evidence of the
15 confusion. We need someone to testify that they
16 went to our place and assumed that the products they
17 were purchasing was sponsored by the bakery.

18 There's no such evidence of that. And
19 anyone walking into Bisou Continental Cuisine would
20 not for a moment think that they are in a
21 neighborhood bakery.

22 THE COURT: But they've gotten calls since
23 they opened with questions, Bisous Bisous, including
24 whether the caller may bring balloons and what the
25 hours are, whether they can make a reservation and

1 what time it is. You know, that's just for example.

2 MR. KULA: Yes, Your Honor. But, again,
3 the trademark covers a very select group of
4 products. It's their bakery goods. It's their
5 pastries. It's their croissants. They don't have a
6 trademark on every imaginable thing that is involved
7 in a restaurant ownership.

8 THE COURT: But you're having confusion
9 over the restaurants, over Bisous Bisous and Bisou.
10 I mean you just are, it's apparent.

11 MR. KULA: It's not the confusion that the
12 lanely act is designed to prevent.

13 THE COURT: Okay. Okay. Go ahead.

14 MR. KULA: I want to go to the -- to
15 the -- again, the no irreparable harm.

16 Again, besides just statements of "Our
17 reputation has been hurt," there's been no
18 indication that there's any type of irreparable
19 harm.

20 THE COURT: Well, what about the
21 declaration of Chef Meyer? She said that they had
22 all these questions about -- about the other
23 business when it was -- you know, it was their
24 business and they were asking about the other
25 business.

1 MR. KULA: Okay. But, Your Honor, that
2 doesn't constitute irreparable harm. Their sales
3 may have increased because of the notoriety.

4 THE COURT: Well, I don't think so. She
5 gives an example of confusion, so that's evidence.

6 MR. KULA: Confusion -- mere confusion is
7 not evidence of irreparable harm, Your Honor.

8 THE COURT: Well, we're still in the
9 confusion part as far as I'm concerned.

10 MR. KULA: Okay.

11 THE COURT: All right. Go ahead.

12 MR. KULA: Okay. But going on to the
13 likelihood of confusion, I think you need to
14 actually go through each of the steps or each of the
15 digits that we're talking about.

16 Before I go into that, though, with regard
17 to injunctive relief, which I know Your Honor knows
18 very well, it's extraordinary relief, requires a
19 clear and convincing showing. But the true purpose
20 of preliminary injunction is to maintain the status
21 quo, as we all know.

22 Here, our client has already opened the
23 doors, they have already been servicing. So what
24 the plaintiff wants is actually extra, extraordinary
25 relief, because they are asking you to basically

1 shut down the business and require them to do things
2 to prevent the status quo from maintaining.

3 And there is case law out there that says
4 that their clear and convincing or clearly showing
5 evidence standard is even more heightening when they
6 are asking you to take proactive action to make my
7 client do something and not just maintain the
8 status quo.

9 Again, if we would go back to January of
10 early this year when they first had notice of
11 possible harm, then they could have maintained the
12 status quo.

13 THE COURT: But I would have said, "That's
14 too speculative." If they had come to me then, I
15 would have said, "There's nothing to show confusion
16 right now."

17 MR. KULA: But everything that they are
18 claiming causes confusion is exactly what they were
19 claiming to the Houston attorneys was going to cause
20 confusion.

21 THE COURT: Well, no, they've had all
22 sorts of instances of confusion since you put down
23 roots.

24 MR. KULA: The only confusion that they
25 have shown in the Dallas marketplace is based upon

1 the disgruntled attorney -- or the disgruntled
2 employee that went out and orchestrated this
3 campaign.

4 THE COURT: Well, no. I mean, Chef Meyers
5 has said she's gotten all sorts of phone calls for
6 Bisou to Bisous Bisous.

7 MR. KULA: Again, there are -- there
8 are -- there is testimony of calls, which I still
9 would contend that the content of those calls is
10 hearsay. And whether the confusion is simply in
11 the -- in the establishment is not confusion in the
12 product that is being sold in the marketplace.

13 THE COURT: Well, first of all, hearsay
14 is -- the Rules of Evidence are relaxed in this
15 situation.

16 MR. KULA: I understand.

17 THE COURT: So some hearsay is admissible.
18 I don't know if it is or not. But either way, I
19 think that is admissible.

20 MR. KULA: Okay.

21 THE COURT: Okay. Those are -- I am
22 overruling your objections to all of those, because
23 I think they are admissible.

24 MR. KULA: I understand, Your Honor.

25 But I think that we need to look at the

1 actual substantive, quote, actual confusion.
2 Because if you get rid of the knucklehead
3 16-year-old boy that showed up for a dish washing
4 job and the delivery man that was simply following
5 an address that was put down on the wrong place, all
6 you have -- and get rid of the orchestrated campaign
7 by Ms. Vasquez, you have these few calls. And even
8 plaintiff admits that the calls were three to six
9 calls, something like that.

10 And I go back to McCarthy's statement,
11 that even if you prove that someone, some place at
12 some time was confused, that isn't enough to prove
13 probable confusion.

14 THE COURT: What about the screenshots on
15 Google and Yelp. They were posted on Bisous Bisous'
16 page.

17 MR. KULA: Again, it's -- I'm beating a
18 dead horse.

19 THE COURT: I know. I know. Go ahead.

20 MR. KULA: It's not -- it's not any kind
21 of confusion. It has to be actual confusion of
22 potential or actual customers viewing the mark in
23 the product -- or of the product in the marketplace
24 and purchasing or wanting to purchase a mark and
25 being confused for the source of the affiliation of

1 the mark.

2 None of that is happening simply by
3 posting an Instagram picture of me, you know, with
4 balloons in my hand outside of a restaurant.

5 THE COURT: They say that they received
6 30 -- over 30 of misdirected reviews, like horrible
7 food, don't go back there, that kind of thing.

8 MR. KULA: Yes. And -- and if you look at
9 these reviews, it's actually almost comical that
10 they are basing their case on these reviews, because
11 they're -- you can tell that they are bogus just
12 from the reviews.

13 I'm looking at, let's see -- well,
14 first -- one of the first reviews at Appendix 411 is
15 someone telling them, "Guys, this isn't the place
16 the girl on TikTok was talking about." That was the
17 third review that came in. So they were on notice
18 right away that these weren't actual reviews.

19 But on page 414, which was up on your
20 screen, Your Honor, here's a review which indicated
21 the person, quote, spit my chewed up food into the
22 water bottle and --

23 THE COURT: I know. That's ridiculous.

24 MR. KULA: There's other ones.

25 Ms. Vasquez, herself, put on one on page

1 415.

2 THE COURT: But they have had 30
3 misdirected reviews, so that's putting aside those
4 few.

5 MR. KULA: Your Honor, there's no evidence
6 that any of those 30 were legitimate. It could have
7 been the same person who is claiming that their dog
8 ran away because the food was bad. That's on page
9 417. Or the review where they say that the food
10 actually tastes like it was chewed by a homeless man
11 and will never go back.

12 And here is the one -- the one instance
13 where there's, quote, arguable confusion among
14 products that are sold at the plaintiff's
15 establishment.

16 This individual says, quote, I ordered a
17 croissant and asked for jam. Instead, they served
18 the pulverized cockroaches and said it was artisan
19 honey."

20 Come on, Your Honor. No one is going to
21 believe that that's an actual review, and we don't
22 even sell croissants. We don't even have -- the
23 only two things that are on our menu that have Bisou
24 related to them is the Bisou Maki and Bisou salad.

25 THE COURT: Bear with me for just a

1 minute. You are both in the food business. You are
2 both called Bisous. And they are getting negative
3 reviews and we think misdirected customers because
4 of you posting -- because of them posting about
5 their experiences in your organization, your
6 restaurant.

7 MR. KULA: Your Honor, before I got here,
8 I looked up how many taco restaurants have
9 trademarks associated with them. There are over
10 1700 taco-related trademarks. Taco Bell, Taco
11 Grande, Taco Bueno. The fact that they have a
12 trademark on bakery goods and restaurant services or
13 cafe does not allow them to claim a trademark on any
14 product that any restaurant sells.

15 THE COURT: Um-hum. Okay. Okay.

16 MR. KULA: I really think that -- I know,
17 again, that the evidence of actual confusion, it
18 seems like that is what Your Honor is honing in on.
19 And I don't think that there has been an evidentiary
20 standard that's been met to prove that any of those
21 evidence of confusion calls are actually legitimate
22 calls of consumers or potential consumers who were
23 actually confused in the marketplace about an actual
24 product during a trademark. So I think they should
25 be discounted unless there --

1 THE COURT: Well, in the -- it was
2 American Century Proprietary Holdings v. American
3 Casualty Insurance Company, 295 F.App'x 630 -- I
4 don't know the jump page. But the -- they said,
5 "The greater the similarity between the products and
6 services, the greater the likelihood of confusion.
7 Direct competition between the parties or services
8 are not required in order to find likelihood of
9 confusion. When products or services are
10 noncompeting, the confusion issue is one of
11 sponsorship, affiliation or connection."

12 So they think that -- I -- I'm telling
13 you, the Bisous Bisous people think that Bisou is
14 them. They do.

15 MR. KULA: I -- I don't --

16 THE COURT: Go ahead. Go ahead.

17 MR. KULA: I don't doubt that they think
18 that, but I'm just saying that that doesn't
19 constitute the type of actual confusion that's
20 required under the Lanham Act to help prove a
21 probable or likelihood of confusion.

22 THE COURT: In that case, they had six
23 instances of confusion over six years. That's only
24 six over six years.

25 MR. KULA: And again, I don't have that

1 case right in front of me, but I believe from my
2 past reading, each of those evidence of confusion
3 was related to an actual product that beared the
4 actual mark that was seen by a potential or actual
5 customer in the marketplace. We don't have that in
6 this case.

7 THE COURT: Okay. Okay. What do you
8 think is missing from this case?

9 MR. KULA: What do I think is missing from
10 the case?

11 THE COURT: Yes.

12 MR. KULA: Well, one, I think that the
13 similarities of the mark, if you actually go through
14 the analysis that is required, where you are looking
15 at the mark and you -- as our brief points out, one
16 mark has Bisous Bisous twice in the plural in block
17 letters. I mean there's cases that go into this in
18 quite detail with regards to the analysis that has
19 to go into looking at the mark.

20 And I know plaintiffs stated this, but I
21 don't believe it's true, is that the fact that we
22 have all lower case and in italics is actually very
23 significant. Because, again, we're concerned about
24 what the consumer or potential consumer is thinking
25 when they see the mark in the marketplace. And if

1 you see all lower case scripted with "Continental
2 Cuisine" after it, and then you see Bisous Bisous
3 Bakery all blocked, you're not going to think that
4 these people are affiliated.

5 THE COURT: Okay. What else?

6 MR. KULA: Okay. Again, the products and
7 the services. The retail outlet is very important.
8 The bakery is open from 8 to 3. The nightclub is
9 open from 4 to 2 a.m. The two do not intertwine.
10 You don't have the same type of people that are
11 coming to the bakery as going to the nightclub and
12 vice versa.

13 Advertising outlets, I agree we both are
14 on social media.

15 The intent issue, although all I can do is
16 either go against us or be neutral, the intent is
17 not the intent of picking this mark, yes, I picked
18 this mark. The intent is, I picked this mark to try
19 and go and usurp on your good will and your
20 reputation.

21 THE COURT: That's not required, though.

22 MR. KULA: No. But I'm saying there was
23 no intent on defendant, and there's no evidence of
24 defendants usurping on plaintiff's good will and
25 reputation by picking that mark.

1 THE COURT: Okay.

2 MR. KULA: Again, the actual confusion,
3 we've gone over that in depth and we have a
4 difference of opinion on that. I will leave it at
5 that.

6 The degree of care exercised by the
7 purchaser. There's a case specifically -- and I can
8 give you the cite to it if you want -- that
9 purchasers of a \$100-dollar of wine use a great
10 degree of care. That's the kind of market that we
11 are in. We are selling hundreds of thousands of
12 dollars of bottles of wine and Champagne, and they
13 are selling 2-dollar tarts. I have never had the
14 impulse to go into a nightclub to buy a
15 thousand-dollar bottle of Champagne. But I readily
16 admit I have had the impulse to go into a bakery and
17 buy a 2-dollar tart. So the products are totally
18 different, and the degree of care that is exercised
19 by the usual, typical customer is totally different.
20 There's not going to be any actual confusion.

21 So once we go and dispel with the
22 likelihood of confusion, which again cases -- and I
23 believe it might have been your case, Your Honor,
24 were you indicated --

25 THE COURT: NFL case?

1 MR. KULA: Yes -- the utmost caution,
2 utmost caution with regards to likelihood of
3 confusion. And the similarity marks the John Crane
4 case that we cited, talks about the total effect.
5 And in that case, there was a very similar situation
6 where the word "Rod" was used in part of the mark,
7 used in part of the mark, but you can't just look in
8 isolation at that.

9 I talked about the defendant's intent.
10 And yes, the NFL property case with regards to
11 products claiming -- the products have to be -- your
12 question in the NFL case was, what are we talking
13 about buying? And your answer was, we're talking
14 about buying football cards.

15 THE COURT: Yeah.

16 MR. KULA: And that is the pertinent
17 question to answer in this case. What are we
18 talking about buying? We are talking about buying
19 pastries, croissants and tarts. We're not talking
20 about Tomahawk steaks and Champagne.

21 I already talked about the retail outlets
22 being so different.

23 Oh, and one thing from the Fifth Circuit
24 in the Fuji case, because they rely on that case a
25 lot, and that case makes an important point, that if

1 the -- if the plaintiff is not diversified -- or
2 they might have said it in the converse -- if the
3 plaintiff is very diversified in products, then
4 there's a likelihood of confusion. Because everyone
5 knows that Coke has a lot of different products, not
6 just soda. But the bakery indicates that they are a
7 niche market. Not only do they only sell French
8 pastries, but their advertisement is they customize
9 them to customers.

10 THE COURT: Nonetheless, people are
11 getting confused.

12 Go ahead.

13 MR. KULA: Again, as Your Honor knows, I
14 know we have a difference of opinion in the standard
15 of evidence, but actual confusion is usually proven
16 by survey evidence and actual witnesses, not just
17 Ms. Meyer saying, "I don't know how -- I don't know
18 how much I've been harmed, but it must be a lot
19 because, you know, there would be a million people
20 walking in my door, and there haven't been."

21 THE COURT: Well, she's just -- go ahead.

22 MR. KULA: Okay. You know, it would be
23 very easy for them to come in and show us that their
24 sales have decreased in the last three weeks, four
25 weeks since opening. They haven't done that,

1 because there is no evidence of harm or confusion.

2 They indicated that -- oh, counsel said
3 that it was because we're having our grand opening
4 in August, then it's -- it's even more likely that
5 this is all going to happen again.

6 Again, this was all started from the
7 disgruntled employee and the TikTok and her 634,000
8 posts. And until there's evidence that proves that
9 all those reviews didn't come from her posts and her
10 friends, then I don't see that there's any evidence
11 of actual confusion.

12 And lastly, unless Your Honor has
13 questions, again, plaintiff was talking about how we
14 had Bisou in our hashtags. Their trademark is on a
15 very select group of products. It's not even just
16 all bakery products, they specifically disclaimed
17 chocolate and other things. It's French pastries,
18 croissants, tarts and some of the other words I
19 can't pronounce.

20 And our -- I thought you were going to
21 interrupt -- interject. And our products are
22 obviously much more diversified, going from salads,
23 appetizers, Champagnes, cocktails and the whole
24 service of entertainment. It's not just food, it's
25 food and entertainment. And even just the casual

1 looking at our gallery in the appendix will show
2 that there's no possibility of anyone being confused
3 at our cuisine -- continental cuisine establishment
4 compared to their bakery.

5 Does Your Honor have any questions?

6 THE COURT: No, I don't right now. Thank
7 you.

8 Are you going to represent Cle, the new
9 party to this case?

10 MR. KULA: Yes, Uptown Bisou?

11 THE COURT: Yeah.

12 MR. KULA: Yeah.

13 THE COURT: Okay. Come on back up here.

14 Tell me about -- about what you have to
15 say, Mr. Conrad, about his objections.

16 MR. CONRAD: Yes, Your Honor. I'm happy
17 to address any points that defense counsel --

18 THE COURT: Well, you know, he says that
19 the confusion has to be as to the product and all
20 that, so very specifically, you know, what do you
21 say to that?

22 MR. CONRAD: I think that what he's
23 getting at is that there's a -- a type of
24 infringement called "forward confusion." And I
25 believe what he's trying to say is that when you

1 think about what may be likely confusion, using the
2 word "likely" there, you have to look at consumers
3 and what they may purchase.

4 That's not necessarily true, because
5 the -- the trademark rights are broader than that.
6 It's avoiding association with. That's in the
7 Lanham Act Statute.

8 So they have -- they, being the Cle
9 Group's restaurants, which is the media associates
10 with Bisou restaurants, they have had negative
11 press, bad press. That -- that is likely to spill
12 over to us.

13 THE COURT: By who? Who have had they had
14 negative press from?

15 MR. CONRAD: So in our papers there was,
16 for instance, I believe, during the early stages of
17 the pandemic, when emergency orders and the like
18 were happening, and actually months into that, they
19 were flouting the restrictions that were in place.

20 THE COURT: Yeah, yeah, I know that.
21 And there was press about that?

22 MR. CONRAD: There was bad press, and
23 we've got those articles in the briefing.

24 THE COURT: Okay.

25 MR. CONRAD: The problem there is that

1 that mark, Bisou, if it becomes associated with
2 their doings, which is -- is not good, it's not
3 family friendly, it's not the image that Bisous
4 Bisous wants to have for their mark, that's a
5 negative association, which is infringement.

6 THE COURT: Why isn't it just baked goods
7 or something like that? Why isn't it just off there
8 because it's just baked goods and restaurants?

9 MR. CONRAD: You mean why -- why is our
10 mark not limited to baked goods?

11 THE COURT: Yes.

12 MR. CONRAD: Because the mark is not
13 limited to what the federal registration says. One,
14 we have multiple federal registrations, though, one
15 of which is for cafe and restaurant services, which
16 is exactly what's at issue here.

17 THE COURT: Okay.

18 MR. CONRAD: But more importantly,
19 trademark is not the registration that provides
20 certain rights. Trademark is the use here in Dallas
21 since 2012, I believe, and at least 2014, 2015, when
22 we -- when Ms. Meyers opened the restaurant
23 storefront. We've been using it in Dallas and have
24 become famous in Dallas, or at least very well known
25 with media, you know, best bakery in Dallas and all

1 sorts of rewards. So that use is all that matters.
2 And that is as close as you can get to Bisou
3 restaurant without opening a restaurant that sells
4 Tomahawks.

5 Your Honor, I have two cases here that
6 might be of assistance.

7 THE COURT: Absolutely.

8 MR. CONRAD: I'm not sure if they are
9 cited, one or two, maybe not.

10 THE COURT: Exxon.

11 MR. CONRAD: Exxon is one.

12 THE COURT: I have that.

13 MR. CONRAD: Armco v. Armco Burglar Alarm
14 Company.

15 THE COURT: I don't have that one.

16 MR. CONRAD: 693 F.2d 115.

17 THE COURT: If you have an extra copy.

18 MR. CONRAD: I do not. I have my copy.

19 THE COURT: F what?

20 MR. CONRAD: 693 F.2d 115.

21 That's from 1982, and it is 5th Circuit.

22 THE COURT: Okay.

23 MR. CONRAD: And there -- instances of
24 actual confusion. So actual confusion does not have
25 to be as narrow as defense counsel --

1 THE COURT: Yeah, I didn't think so. I
2 was just curious about that.

3 MR. CONRAD: Here, the actual confusion
4 that happened was Armco's lone Tarrant County
5 employee testified that he had received phone calls
6 at least once a month from people trying to reach
7 Armco Burglar Alarm. That's it. There's no more
8 evidence that the Court relied on.

9 He also testified that two acquaintances
10 of his had asked, "When did y'all get into the
11 burglar alarm business?" assuming I got the accent
12 right. But acquaintances, those are customers.

13 THE COURT: I will let you respond to
14 that.

15 MR. CONRAD: Fletcher's State Fair
16 Original Corny Dogs v. Fletcher Warner Holdings,
17 LLC, 434 F.Supp.3d 473.

18 THE COURT: Hold on a second.
19 F.Supp.3d 473.

20 MR. CONRAD: Eastern District of Texas.

21 And here, consumers, venues and events
22 that solicit vendors have all been confused. It's
23 not customers. Additional instances in which
24 consumers have been confused and posted their
25 misidentification on social media or shared their

1 confusion with the head of marketing event.

2 So again, those were not actual customers
3 that purchased something. But again, that was
4 actual confusion.

5 THE COURT: Okay. That's what I needed to
6 hear.

7 MR. CONRAD: Would you like these, Your
8 Honor?

9 THE COURT: Yeah.

10 MR. CONRAD: May I approach?

11 THE COURT: Give it to her, Jordan.

12 All right. Thank you.

13 Anything else?

14 MR. CONRAD: Your Honor, we're not trying
15 to shut down their restaurant, that's not the relief
16 requested, just ceasing the use of marks. They can
17 sell Tomahawk steaks and wine under any other mark.

18 THE COURT: Yes.

19 MR. KULA: Yes, just very briefly, Your
20 Honor.

21 I don't believe there's been any evidence
22 shown of actual harm, let alone irreparable harm.
23 They haven't shown any -- any lost sales, any --

24 THE COURT: They have rebuttal presumption
25 of that. Have you rebutted that?

1 MR. KULA: Well, yes, because, as I said,
2 even if you show there's a likelihood of confusion,
3 then you're assuming that there's going to be
4 irreparable harm. The rebuttable presumption was
5 they sat on their rights for seven months and let
6 the harm come to them. That's one.

7 THE COURT: I'm saying that I wouldn't
8 have given them an injunction with the stuff they
9 had in January. But go ahead.

10 MR. KULA: Okay. The other rebuttable
11 presumption is that -- or the other rebut to the
12 presumption is that they haven't shown any harm, and
13 it would be very easy to come in and show harm.
14 There is two things that I wanted to point out.

15 One, in plaintiff's presentation, he
16 showed pictures that are put on the -- on the
17 bakery's site. And in the middle there was a
18 picture of our client's establishment. And his
19 statement was, "You can obviously see that's not
20 family friendly." And that's a key to it. No one
21 is going to be confused by the things that are on
22 our website or on our Facebook page with a
23 neighborhood bakery that caters to the local
24 community.

25 I just want to give you -- or if Your

1 Honor wants --

2 THE COURT: I'm open to anything you want
3 to tell me.

4 MR. KULA: Okay. I would like to just
5 give you some case cites. That's what I was going
6 to say. I will give you case cites or my folder of
7 the cases.

8 THE COURT: No, case cites.

9 MR. KULA: Okay. Okay. So this is
10 Checkpoint Systems v. Check Point Software
11 Technologies, 269 F.3d 270.

12 Now, it's a 3rd Circuit case, but it does
13 state that, "To prove likelihood of confusion,
14 plaintiffs must show that, quote, consumers viewing
15 the mark would probably assume the product or
16 services it represents is associated with the source
17 of the different product services identified by the
18 similar mark."

19 And I don't believe that we have that
20 here. I won't go into all the quotes since I gave
21 you the cite.

22 THE COURT: Please don't.

23 MR. KULA: I won't.

24 The other case that I want to point out,
25 which is somewhat similar, is Planet Hollywood v.

1 Hollywood Casino, and that is 80 F.Supp.2d --

2 THE COURT: Okay. 80 F.Supp.2d.

3 MR. KULA: -- 815, and that's your sister
4 Court in the Northern District of Illinois.

5 Similarly, Ellipse Communications, Inc.,
6 v. Caven, C-A-V-E-N, and that is a 209 -- 2009
7 Westlaw.

8 THE COURT: Okay. What's the Westlaw
9 number?

10 MR. KULA: 497268.

11 THE COURT: Oh, wait, wait, wait. Slow
12 down 497.

13 MR. KULA: 268, sorry, and that's out of
14 Your Honor's Court.

15 THE COURT: Okay. I think I have enough
16 cases.

17 Anything else?

18 MR. KULA: Two more cases.

19 THE COURT: Okay. Okay.

20 MR. KULL: I won't -- I won't cite your
21 own since you know them, I'm sure, quite well.

22 THE COURT: Yeah.

23 MR. KULA: The other two that I want to
24 bring to your attention is -- sorry.

25 I'll just give you the cite, because I

1 can't pronounce the first one.

2 THE COURT: That's fine.

3 MR. KULA: 730 F.3d 494, and that's a 6th
4 Circuit case.

5 THE COURT: Okay.

6 MR. KULA: And the last one is Water Pik,
7 Inc., v. Med-Systems, and it is 848 F.Supp.2d 1262
8 out of the District of Colorado.

9 THE COURT: Okay. I will go -- I'm going
10 to take a break and look at all this stuff.

11 Do you have anything else you wanted to
12 say?

13 MR. KULA: No, Your Honor, unless you had
14 questions.

15 THE COURT: Anything else, Mr. Conrad?

16 MR. CONRAD: No argument, Your Honor. But
17 I do have transcripts for the two victims we
18 submitted with the supplemental filing. Would you
19 like those?

20 THE COURT: Yes, yes, yes.

21 MR. CONRAD: May I approach?

22 THE COURT: Yes, you may. Give them to
23 her.

24 Okay. We will be in recess for about 10
25 or 15.

1 (Recess taken.)

2 THE COURT: Sorry that took so long.

3 Let me just start up here.

4 First, as Bisous Bisous argues, it has a
5 protectable right to all its registered marks and
6 Bisous Bisous is -- is -- because -- at least with
7 respect to its word marks. Bisous Bisous' word
8 marks protects the use of the words "Bisous Bisous"
9 in various classes, including -- let me get my
10 glasses here. I don't see them -- including cafe
11 services, restaurant services, without regard to the
12 font, style or color of the words.

13 That's plaintiff's appendix 22 to 25.

14 Bisous Bisous' design mark protects its
15 logo. Because Bisous Bisous' logo is more distinct
16 than the words "Bisous Bisous" alone, defendants'
17 use of the word "Bisou" in their advertisement does
18 not look similar to Bisous Bisous' logo. I do not
19 consider Trademark Number 4811208. It is not
20 necessary, as infringement of one trademark claim is
21 enough for the other. So, anyway, the trademark is
22 broader than I think you have described it,
23 Mr. Kula.

24 So the -- you argue that the -- your
25 rights -- that the rights are limited to the market

1 in connection with the bakery goods. Well -- but
2 Cle or your company ignores Bisous Bisous owns both
3 the word mark for Bisous Bisous and the design mark
4 for its logo in the cafe and restaurant service.
5 This class includes services for providing food and
6 drink. Thus, Bisous Bisous's interest is not
7 necessarily as narrow as Cle, the defendants, state.
8 Because Cle does not contest whether Bisous Bisous
9 has a protectable right to its mark and consequently
10 focuses on disproving likelihood of confusion, I
11 find that factor in favor of Bisous Bisous.

12 So likelihood of confusion has a lot of
13 things about it, but one of the things is a type of
14 mark. I think this is an arbitrary mark. I don't
15 know if -- I think you, Mr. -- Mr. Conrad also
16 thought it was an arbitrary mark. I don't know if
17 you did, Mr. Kula.

18 MR. KULA: Yes.

19 THE COURT: Okay. It's arbitrary, and so
20 we know that, and so that's the case.

21 Similarity between the marks. I'm not
22 going to talk about that because we have no need to.

23 In assessing the similarity of products
24 and services, exact similarity is not required.
25 That's the Dallas Cowboys case, 615 F.Supp. 638.

1 There may be a likelihood of confusion even if the
2 parties are not direct competitors. You-all know
3 that, I talked about that, and I'm not going to cite
4 to the case; no need to.

5 The Court has repeatedly held that direct
6 competition is not the key to trademark
7 infringement, rather the gist of the action lies in
8 the likelihood of confusion of the public.

9 Indeed, both defendant and plaintiff serve
10 French-inspired food. Bisous Bisous' menu has
11 macarons. Bisous Bisous' menu has croissants and
12 eclairs, and it goes same -- you know, a little bit
13 with Bisou.

14 Bisou Dallas menu includes, among other
15 things, escargot and bone marrow, cake beignets,
16 crab cake beignets and pommes frites.

17 The retail outlets are similar. Both are
18 brick-and-mortar stores on McKinney Avenue in Uptown
19 Dallas. That is pretty key. Cle makes no direct
20 argument that retail outlets are dissimilar;
21 however, many -- it did today. However, many times
22 throughout its briefing, it refers to Bisou Dallas
23 as a 10,000 square foot Social Dining Hotspot. But
24 the establishments have likely similar purchasers
25 due to their proximity. And they -- to the extent

1 Bisou Dallas attracts persons across DFW, Bisous
2 Bisous likely does, too, and I will go into it in
3 the order about why I think that.

4 The identity of advertising media used.
5 This factor favors Bisous Bisous. The greater the
6 overlap in the marketing approaches of the two
7 entities, the greater likelihood of confusion.
8 That's Dallas Cowboys case, 616 F.Supp.2d at 639.

9 Bisous Bisous posits that both it and
10 Bisou Dallas rely on the website and social media to
11 advertise. Cle concedes both bakery and the
12 Dallas-based restaurant currently use the same
13 advertising channels.

14 And finally, actual complaints of
15 confusion. First of all, I want to be clear that,
16 you know, nonconsumer confusion can be evidence of
17 confusion, but I don't think that's what we're
18 really talking about. Because you're saying,
19 Mr. Kula, that it has to be at the time of purchase
20 or something. But I think it could be a variety of
21 circumstances that are confusing to the ultimate
22 purchaser, like the advertising, the willingness --
23 you know, the talking about it on the internet. I
24 don't think it has to be the actual time they buy
25 the product that they are supposed to be confused.

1 I think it can be a wide variety of circumstances.

2 Anecdotal instances of consumer confusion
3 or consumer surveys.

4 So testimony of a single known incidence
5 of actual confusion has been found sufficient
6 evidence to support the district court's finding of
7 actual confusion.

8 Now, I know this is like July, happened in
9 July at least. It's only the beginning of August or
10 August 11th, so we have instances of confusion.
11 Bisous Bisous has presented evidence of actual
12 confusion, a declaration of Chef Meyer in which she
13 states that since Bisou Dallas opened, Bisous Bisous
14 has received phone calls with questions for Bisou,
15 including whether the caller may bring balloons and
16 the hours are -- what the hours are and whether the
17 caller can make a reservation and what the wait time
18 is.

19 In fact, Bisous Bisous's owner states in a
20 July 20, 2021, Bisou's bakery manager counted 11
21 call that were intended for Bisou Dallas, and that's
22 July 10, 2021, just a mere month ago.

23 It's -- it's -- so second, Bisous Bisous
24 has submitted screenshots of Google and Yelp reviews
25 posted soon after the day Bisou Dallas opened that

1 were intended for Bisou Dallas but were erroneously
2 posted on Bisous Bisous's page. And I told you-all
3 about that. We have gone over that ad nauseam.

4 Then Chef Meyer described two following
5 incidents. On June 9, 2021, an individual
6 mistakenly showed up at Bisous Bisous for an
7 interview on an information and belief he was
8 seeking to interview at Bisou Dallas.

9 And one week prior to the opening of Bisou
10 Dallas, a carrier mistakenly delivered a large set
11 of supplies addressed to Bisou Uptown and intended
12 for Bisou Dallas.

13 So I think Bisous Bisous has clearly
14 demonstrated actual confusion between it and Bisou
15 Dallas. Though it's not clear from the record
16 whether Bisous Bisous continues to receive
17 misdirected calls, I think a month -- let's just say
18 a month ago is -- is -- is close enough for me.

19 So, you know, on the -- let's see.

20 So, you know -- and I'm also not going to
21 reject the confusion of the interview applicant and
22 parcel carrier wholesale because I have held before,
23 courts have held before, that nonconsumer confusion
24 can be -- provide some slight discounted weight.

25 So all of these things, and there's so

1 many -- I mean, there's like 11 calls in one day or
2 11 calls that the bakery manager talked about. I
3 think that's enough to establish confusion. And I
4 don't think you have rebutted the presumption that
5 there is rebuttable -- there's a rebuttable
6 presumption of irreparable harm.

7 So I'm going to grant the injunction. We
8 will keep it narrow to them in Dallas, getting rid
9 of their name, their trademark, but I won't do
10 anything to the Houston entity right now.

11 Any questions about this?

12 MR. KULA: Yes, Your Honor. We would
13 request a bond be put up by the plaintiffs.

14 THE COURT: Okay.

15 MR. KULA: I indicated on page 1 of my
16 brief, \$500,000.

17 THE COURT: Mr. Conrad.

18 MR. CONRAD: Your Honor, we laughed at
19 that, as well. The plaintiffs -- the defendants
20 have not put on any evidence for any harm that may
21 incur to support a bond of any kind. And in fact,
22 there's authority in the 5th Circuit that the --
23 that you don't have to require a bond in order to
24 issue an injunction.

25 So if there's any bond that this Court

1 deems fit, it should be very low, you know, a
2 thousand dollars or something of that nature. So
3 that's our position.

4 THE COURT: Right now I'm not going to
5 require a bond. You can file a motion, and I will
6 consider that again. But I'm not going to require a
7 bond right now. Okay.

8 Anything else?

9 Mr. Kula?

10 MR. KULA: No -- I'm sorry. No, Your
11 Honor.

12 THE COURT: All right.

13 Mr. Conrad?

14 MR. CONRAD: No, Your Honor.

15 THE COURT: Okay. Thank you.

16 (Court in recess at 4:47 p.m.)
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C E R T I F I C A T E

I, Shawnie Archuleta, CCR/CRR, certify
that the foregoing is a transcript from the record
of the proceedings in the foregoing entitled matter.

I further certify that the transcript fees
format comply with those prescribed by the Court and
the Judicial Conference of the United States.

This day of 2021.

s/Shawnie Archuleta
Shawnie Archuleta CCR No. 7533
Official Court Reporter
The Northern District of Texas
Dallas Division

My CSR license expires: December 31, 2021

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